UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 11 CR. 1091 (VM)

PETER LESNIEWSKI, et al.,

Defendants.

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New York, N.Y.
May 13, 2016
3:20 p.m.

Before:

HON. VICTOR MARRERO,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
NICOLE FRIEDLANDER
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Assistant United States Attorney

DURKIN & ROBERTS
Attorneys for Defendant Peter Lesniewski
BY: THOMAS A. DURKIN
JOHN CLINE

SEAN M. MAHER
Attorney for Defendant Peter Ajemian

JOSEPH W. RYAN, JR.
Attorney for Defendant Joseph Rutigliano

THE COURT: Good afternoon. This is a proceeding in the matter of the United States v. Lesniewski and others, docket number 11 CR 1091.

Counsel, please enter your appearances for the record.

MS. FRIEDLANDER: Good afternoon, your Honor. Nicole Friedlander and Daniel Tehrani on behalf of the government.

MR. DURKIN: Tom Durkin and John Cline on behalf of Dr. Lesniewski. For the record, Judge, Mr. Cline filed pleadings in this court of counsel. I don't believe he's been admitted pro hac vice, but I would ask that he be permitted to appear today if that's okay.

THE COURT: Is he going to be involved in the matter beyond today?

MR. DURKIN: Yes. If we go beyond today, he can file an appearance.

THE COURT: I will then direct that be filed, file an appearance and file an application for pro hac vice. I will allow him to appear or to sit at the table today.

MR. DURKIN: Thank you, your Honor.

MR. MAHER: Sean Maher for Dr. Peter Ajemian. Good afternoon again.

THE COURT: Good afternoon.

MR. RYAN: Joe Ryan for Joseph Rutigliano. Good afternoon, your Honor.

THE COURT: Good afternoon. The Court notes that the

defendants are not present in the courtroom for this proceeding, but I indicate that this proceeding is not the sentencing that the Court scheduled in the matter.

It's a hearing on a motion by the defendants for a determination as to whether the sentencing was appropriate in light of what they allege is new information that might have a bearing on the amount of the loss that is part of the underlying proceedings of which they were convicted, and that amount of the loss, therefore, to some extent, determined the sentencing range.

The defendants claim that in light of certain actions taken by the Railroad Retirement Board with respect to some of the Long Island Railroad retirees who have filed applications for disability and who were subsequently or in recent months re-examined by the Railroad Retirement Board and their disability was reconfirmed, that those circumstances might have some bearing on the amount of the loss that is at issue here.

In order to examine whether in fact the actions that were taken by the Railroad Retirement Board does in fact affect the loss amounts and, therefore, the potential sentencing range of the defendants, the Court invited the parties to submit briefings on the issue and subsequently to appear at this proceeding in order to further enlighten the Court as to their respective views on this matter.

I have received the submissions that were made by the

three defendants, as well as by the government.

One additional matter, the defendant, Dr. Ajemian, began his defense of this matter pro se. And the Court, upon request by Dr. Ajemian, granted an application for appointment of counsel. And, for that reason, Mr. Maher was appointed to represent Dr. Ajemian in this matter.

Ms. Friedlander, does the government have anything by way of further background that the Court should consider before turning the matter to the defendants to set forth their case?

MS. FRIEDLANDER: Yes, your Honor. Thank you.

To begin with, this comes in the context of the sentencing that we had where the Court made a reasonable estimate of loss. "Reasonable estimate of loss" is, of course, the legal standard. Baran and Rutigliano claimed at the time of sentencing --

THE COURT: Ms. Friedlander, let me stop you for a moment because I made reference earlier to the fact that the defendants are not present. I explained the reason. I want to make sure that there is no disagreement that any of the defendants are entitled to be here.

MS. FRIEDLANDER: Your Honor, correct.

THE COURT: And that their appearance is thereby waived.

Mr. Durkin.

MR. DURKIN: Judge, we have no problem going forward.

I think under the habeas rules, it's permitted to begin with. We would waive it for today's purposes.

THE COURT: Mr. Maher?

MR. MAHER: So waived.

THE COURT: Mr. Ryan?

MR. RYAN: So waived.

THE COURT: You may proceed.

MS. FRIEDLANDER: Your Honor, as you'll recall at the time of sentencing, Baran and Rutigliano objected to including all the workers who applied for disability through them in their loss calculations because they said, look. It's possible that some of these people actually were disabled.

As a matter of happenstance, some of those people could have been disabled. Of course, the law just requires the Court to make a reasonable estimate of loss. The Court did that, and the Court was upheld summarily by the Second Circuit. So that's the background.

Now the defendants are making a collateral attack on the judgment. They are subject to an extremely high standard, as the Court knows. They can only attack the judgment if there was a fundamental defect in the judgment that inherently resulted in a complete miscarriage of justice. They cannot come close to meeting that high standard here.

The Court used the proper measure of loss at sentencing, and that is the intended loss. Nothing the RRB has

done affects what the defendants' intended loss amount was.

The Court found that the defendants' intended loss was a loss of the size and scope of the loss included in their guidelines. Dr. Ajemian allocuted to it.

He said he committed fraud -- I don't remember the exact word -- droves of Long Island Railroad employees. He allocuted to widespread fraud in this court. Our witnesses testified to it.

We showed the Court and the jury at trial 269 identical applications completed by Mr. Rutigliano, these cookie-cutter applications, as your Honor will recall, filled with these boilerplate descriptions of incredible pain and suffering.

They were all totally identical. One set he used for engineers, another set he used for white-collar folks, another set he used for another kind of worker, all boilerplate.

Dr. Lesniewski, as you'll recall, was interviewed before charges were brought. He admitted to lying to further false disability applications. At one point in the interview, he admitted to lying in roughly 20, 25 percent of the cases. At another point in the interview, it was 50 percent. At another point in the interview, it was 100 percent of the vocational reports that he helped prepare included statements that he said he would not now make.

So there was overwhelming evidence that the

defendants' intended loss of the size and scope. The Court has previously found that nothing about what the RRB is doing now changes that analysis. So the intended loss calculation is absolutely correct.

Further, now as to this RRB process -- so I said nothing that the RRB has done ought to affect the intended loss, the Court's intended loss calculation. Let me just talk about what the RRB has done.

We can't take at face value the veracity of reapplications of a bunch of people who committed fraud ten years ago with our defendants. Maybe some of them are telling the truth, but maybe they're not. We just don't know.

There is no reason to just assume that all of them are valid on their face, particularly in light of what we know, which is that there was a whole lot of fraud going on in the past. So that's on the applicant's side.

On the process side, as the Court is well aware, there have been problems, to say the least, with the RRB's disability approval process.

Others have questioned whether there is negligence there. Also the Second Circuit raised the question of whether there's complicity there. I'm not raising those questions, but others have done that, as the Court is aware.

The RRB, the disability review process, is currently the subject of a congressional investigation. So congress is

investigating whether the RRB's disability process, particularly in light of these pre-approvals, is fundamentally flawed.

They are looking at whether fraud is completely endemic in the system to this day, whether the RRB has the ability and the interest in rooting it out. So these are additional reasons why we can't just assume that all of these pre-approvals are evidence that people are disabled and not committing fraud.

Further, Judge, even if they all are disabled today -- and I don't think that they are. I'm not saying that they are. But even if they were, that doesn't tell us if they were all committing fraud ten years ago, which was roughly when most of these people applied for disability, when they were working with the defendants in this case.

You just can't infer from the fact that they have some problem now that they had some problem ten years ago. And I'll add to that that many or most of these people that are applying applied based on conditions that were not the same condition that they applied ten years ago. Sometimes there's overlap; sometimes there's not overlap.

Lastly, your Honor, even if the Court wanted to say I think that all of these people who reapplied, all of the losses associated with those people ought to be taken out of the defendants' loss calculation and we're only going to now hold

the defendants accountable for losses associated with people who have not reapplied for disability -- and the Court ought not to do that for the reasons I've said, but even if it did, as we said in our papers, the defendants' guidelines hardly move.

Lesniewski and Ajemian's guidelines would come down by two levels. Rutigliano's by four levels. Those result in guideline ranges as to Lesniewski and Ajemian but are still higher than the sentence the Court gave.

So the Court imposed a 96-month sentence. The adjusted guidelines ranges for those defendants I think would be 97 to 121 months. As to Mr. Rutigliano, his adjusted range would be 87 to 108 months. He too got a 96-month sentence. So his sentence is squarely within what the adjusted guidelines range should be.

What that tells us is that there is no way that we can look at the sentences that the Court gave them initially and say that those resulted in a complete miscarriage of justice.

THE COURT: Thank you.

Mr. Durkin.

MR. DURKIN: Judge, I'm not sure I profess to understand what a "miscarriage of justice" is anymore, but if this isn't one from a sentencing perspective, then I don't know what I'm doing.

I don't think there's any question that at the

sentencing that we had that I have a transcript of on February 21, 2014, we were talking about the total amount of individuals who were just simply not entitled to disability.

We attempted to raise some of that at the trial, but we didn't do that because we don't need to discuss the Rule 33 aspect of it. But there's no question, in my mind -- and I doubt in yours -- that what we were talking about was the government's theory that they espoused throughout the whole case which we attacked throughout the whole case which was all these people simply were not work-relatedly disabled.

I think this new evidence overwhelmingly shows that they were. Then we get into an argument over actual loss versus intended loss. I just cannot help but imagine that if we had this evidence before you then, that we wouldn't have had a different result. I defer to you on that. I know how much I like you, even if we disagree.

The fact of the matter is that this new evidence contradicts the entire theory of the government's case, which is something we complained about from day one.

These sentences were based on, I think, assumptions that the government withheld that much money, actual money. They were sentenced accordingly.

Now I understand you didn't go within the guidelines. But eight years is a very, very difficult sentence. And I think -- I could be wrong -- that it had to reflect what you

would have thought was the actual loss at that time.

I think there are very good arguments that we could put forward to you that at best, if you want to take -- if we're talking actual loss, which is what I believe they should be sentenced under, Dr. Lesniewski -- if you want to say the government proved that the four witnesses on the witness stand whose credibility is what it is, and the jury accepted it. So I accept it for our purposes.

But that only amounts to close to $1,000,000, if my math is correct, which is a substantial deduction in the -- what's the right term under the guidelines? The projected guideline range or whatever you have to make the finding of before we get into 3553(a).

But it seems to me that if we had that actual loss amount, we would have started with a lower guideline. I think then you still would have gone down.

I looked back over our sentencing papers last night and this morning with the amount of letters that Dr. Lesniewski's family submitted, the incredibly compelling 3553(a) factors. I cannot help but believe vis-à-vis what I would consider a miscarriage of justice.

I would consider having to spend more time than you deserve in prison under facts that later are proven to be true is a miscarriage of justice. Whether that fits the legal standard or not, I have no idea.

After 43 years of doing this, if that's not a miscarriage, I don't know what is. It's something that should be fixed. I think you were correct in deciding that you needed to look into fixing it. I think it should be fixed.

I assume we don't need to get into any other recommendations as if we're having a sentencing. That's really all I have on the miscarriage issue.

Could I just speak to Mr. Cline for a second.

THE COURT: Sure.

(Pause)

MR. DURKIN: Just one other issue. Mr. Cline reminds me that you did make a finding of $70,000,000 in restitution, which I believe would indicate you must have been calculating actual loss. I don't think that's either here nor there.

I think that this evidence overwhelmingly demonstrates that we were operating under bad facts, wrong facts, whatever you want to say. That's not being critical of anyone other than I will stand on the proposition that we were critical of that theory throughout.

One other thing that Ms. Friedlander talked about, the confession. We argued over that. My recollection is that Dr. Lesniewski said he was exaggerating.

The fact that he said he would do it over again, there are a lot of things that you would do over again. The reality is I think this evidence shows that he's doing more time than

he should be doing. I'd ask you to re-sentence him.

THE COURT: Thank you.

Mr. Maher.

MR. MAHER: If I may defer to Mr. Ryan first, your Honor.

THE COURT: Sure.

MR. RYAN: Judge, I was really taken back by the prosecutor telling you that you should have some doubt about the RRB's approval process because congress is conducting some kind of inquiry.

I don't know where that came from. It's just the opposite. The inspector general, Martin Dickman, went before the joint congressional committee and asked them to change the law because the RRB found that 98 percent, under a standard that was very lean, were a problem.

If you have any complaint about the payments on these disabilities, you have to change the standard. There's no suggestion whatever that the RRB approval process, which your Honor brings us here today, is suspect, absolutely no suggestion at all.

And then the other suggestion I heard was that you can't tell whether the applicant that was reapproved committed a fraud in the first instance.

I don't know where that comes from, because when you see the re-approval documents, the doctors that the RRB used to

reapprove these claims considered all of the impairments that the applicant had and noted that they were degenerative discs, which is a common injury in these cases, that pre-existed existed at the time of re-approval despite the passage of time.

If the RRB doctors' examination showed that there really was no impairment when the approval was first given, they wouldn't approve the second application.

It doesn't make sense that a retiree makes an application under false pretenses and is approved and then eight years later is reapproved should be paid for the entire period of time. It doesn't make sense.

So this re-approval process was enacted by the RRB to determine by every medical process available that these retiree applicants were granted the annuities or entitled to the annuities then and now.

They hired these doctors, independent medical examinations conducted of these re-approval applicants. The claims examiner -- and they are very conscious of this case, the public's oversight on this case, and the doctors who did the re-approval submitted their reports.

They physically examined, physically examined, had them do the musculoskeletal test where you have to lift weights and bend over and they make all these measurements and found that the applicants had these restrictions and they couldn't perform every task on their job.

So they were entitled to a continuation of their annuity. Even though they were approved back seven or eight years before, they're entitled to all this money.

So now if the RRB is saying that 538, whatever the number was, are entitled to these payments, your Honor is absolutely correct that this has a major impact on whether the RRB lost money.

The RRB is telling your Honor that we're paying the money. We're not losing the money. We're paying the money, and that's why we're here. So the answer to the question, your Honor, if a resentencing should take place, I resoundingly say yes.

One suggestion I have, because the determination as to what constitutes a loss has been an issue for a motion for a new trial and will be an issue before the Second Circuit, in Rutigliano's case, the calculations of $82,000,000 -- there's no way you can change that. $82,000,000 was the actual loss submitted by the government through the PSR.

It was the amount of restitution judgment, and it was the amount that your Honor considered in sentencing Mr. Rutigliano, $82,000,000. That was based upon a spreadsheet that had no relationship whatever to whether or not the claims were properly paid or not.

That spreadsheet was used by the prosecution through a computer text recognition program only for the purposes of

trial to say that Mr. Rutigliano must have prepared the other 268 because the language is similar.

But the RRB evidence shows that on that Exhibit 19, which was admitted into evidence, that those payments, those claimants, are being paid today. That was not a loss. These people are getting paid today.

In our submission, I gave you ten cases illustrating that these re-approval applicants were also on this Exhibit 19 that led your Honor to accept their calculation of $82,000,000.

Exhibit 19, your Honor, I respectfully submit isn't worth the paper it's written on. It wasn't made for sentencing. It was a trial technique to support the government's argument about how bad Mr. Rutigliano was influencing all these other applicants.

So I have one suggestion. One suggestion I would like the Court to consider is that there were two witnesses. There are three applications at issue that don't depend on Exhibit 19. There's James Marr, Christopher Pelant, and Mr. Rutigliano's application.

Marr we had the opportunity to cross-examine. Pelant we had the opportunity to cross-examine. As to Mr. Rutigliano's application, they called Dr. Baran, the expert who never examined Mr. Rutigliano offered his opinion that there was something I'm going to say fishy about his application.

If you take the losses on those three applications, it adds up to just over a million dollars. Exhibit 19 is out of the picture. The Court doesn't have to rely on 19. You rely on the jury's acceptance of the testimony of Marr, Pelant, and Baran, Dr. Baran.

You add that up, and it's a little over $1,004,000. I have the actual figures. The loss figures for those three applications are $295,000 for Mr. Pelant, $347,000 for Mr. Marr, and $402,000 for Mr. Rutigliano.

That's how much money they were paid by the RRB based on what the government claims were false applications. That adds up to $1,044,000. Under the guidelines, that would add to the base level of 7 14 levels. So now you're at level 21.

Now, your Honor considered the 3553 factors which deals with the background of the defendants that the Court must consider. At the original sentence, you reduced by four levels what the sentence would be on loss alone.

So the proposition I'm offering the Court to consider is that if you take the level 21, which is based upon a $1,000,000 loss, you subtract the four levels, you're going to get to level 17. Level 17 provides a sentence between 24 and 30 months. As I stand here today, Mr. Rutigliano has served 23 months.

So that's one suggestion I have. When I make the loss proposition, I'm making it for the purposes of sentencing. I

don't concede that the determination was proper under the standard at trial, but that's another issue.

So I would like to suggest that your Honor consider a resentencing based upon the loss applications generated by the Rutigliano, Pelant, and Marr applications and then apply the guidelines and the 3553 factors. Then I think you would come to level 17. I think that might be one practical way to cut through all of this. Thank you very much.

THE COURT: Thank you.

Mr. Maher.

MR. MAHER: Thank you, your Honor.

As your Honor knows, I'm pretty late to the game here. But I think, having just come on to this case, it actually, I think, gives me a somewhat unique perspective because I've been reading the pleadings and other documents in this case almost as if it was a novel.

It's amazing and heartbreaking for me to think about what Dr. Ajemian and his family have been going through and where I think basically the government has led this Court at this point.

There are just three things I want to touch on. One is the role of defense counsel. Mr. Ajemian's pro se submissions talk about the role of his defense counsel.

As I read the evidence in this case now, I cannot think right now of any attorney who has practiced criminal

defense in this country who I would consider competent and above -- and I would even dip below competent -- who at this point if they get this file that I have sitting in front of me and piling up in my office and have to sit right now and say, Dr. Ajemian, here is the government's case, and the government wants you to consent to a forfeiture of $116.5 million and almost a decade in prison. I think you should do it. I cannot think of one attorney who is scraping competent and above who would make that suggestion.

Of course, this evidence was not available to prior counsel when that plea agreement was made and when that plea was entered.

So I think under newly discovered evidence, it is nothing less than a bombshell what it suggests, as far as loss amounts. Basically, they have completely dematerialized as far as Dr. Ajemian.

The second thing that I want to touch upon is the independent role of the Court at sentencing. That is, I think, a bedrock principle that every citizen and parties in our country expects and cherishes, that the Court has an independent role to base its sentencing on truthful, reliable facts and representations.

When that does not happen, that is what we consider a miscarriage of justice. We're not talking here about arguments over whether there's a retroactive application of an adjustment

and a guideline.

We are talking about whether the Court's independent assessment of the facts and arguments that led the Court to craft a uniquely individualized sentence that reached all the way up to 96 months and $116.5 million was based on misleading and false facts.

Because that's what's happened. I'm not trying to say that the government intentionally mislead the Court, but the facts that the Court relied on to generate those numbers were misleading, and they're false at this point. They're objectively false.

So there is no greater manifest injustice, Fifth Amendment due process violation, other than perhaps the actual sentence of death to someone on false evidence, than for someone to be incarcerated with the terms that Dr. Ajemian, who was 61 years old when he came before this Court and who now still is potentially facing what could be a sentence where he dies in prison infirm.

So I do not see how there is any other definition of manifest injustice under the due process clause. When you wrap these all together, there is no other course but for the Court to grant a resentencing for Dr. Ajemian. Thank you.

THE COURT: Ms. Friedlander.

MS. FRIEDLANDER: Your Honor, just a couple of quick points that I think the defense might have made that I think

muddies the waters a little bit.

To be clear, this re-approval that the RRB has done -- it's granting disability payments or declaring people disabled only from the time of this reapplication. So it's from a time postdating the sentences in this case. So the RRB did not say, okay. You've been disabled since, you know, day one. It's only since the post-sentencing date on which they reapplied.

The second point, there was some discussion of the fact that restitution was based on actual loss. I thought defense counsel might have been suggesting, therefore, that the Court based its loss amount for guidelines purposes on actual loss.

Absolutely restitution is based on actual loss. It has to be. Restitution is the amount that the victim has actually lost. It's not an independent loss figure.

The Court properly based the loss calculation, for guidelines purposes, on intended loss. As the PSR suggested, as we suggested, as the Court found, and as the Second Circuit upheld, that was the right way to calculate the guidelines.

MR. RYAN: May I be heard on that?

THE COURT: Briefly, Mr. Ryan.

MR. RYAN: That's not correct to say. You accepted the calculations in the PSR. The PSR had an actual loss of 82 and an intended loss of 102 millions. That's what it was.

When you look at the RRB documents that we submitted

in support of this proceeding today, they're going to show you, your Honor, that the RRB was well aware of the impairments that were originally recognized, and they were recognized on re-approval.

They were continuing payments, continuing payments from the first day. They never stopped the payments. They never sought the claimant to bring back payments because they originally got them improperly but now they have them properly. None of that makes sense. It's continuing payments throughout. Thank you very much.

THE COURT: Thank you. I will examine the testimony of the arguments that were made today in light of the balance of the record, and I'll make a determination as to what the next steps will be, if any. Thank you.

MS. FRIEDLANDER: Thank you.

MR. RYAN: Thank you, Judge.

THE COURT: Have a good day and a good weekend.

(Adjourned)